In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-154

JOHN MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he is entitled to a new trial on two substantive counts because he was acquitted of conspiracy to commit those offenses; that evidence derived from wire interceptions should have been suppressed because petitioner was not identified in the wire interception application and order; and that he is entitled to an evidentiary hearing to determine whether, as was established by affidavit, the wire interception application had been authorized by the Attorney General.

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of using interstate commerce facilities to transmit gambling information and to promote an illegal gambling business, in

violation of 18 U.S.C. 1084 and 1952.[1] He was sentenced to two concurrent terms of one year's imprisonment, with immediate eligibility for parole under 18 U.S.C. 4208(a)(2), and fined $2,000. The court of appeals affirmed (Pet. App. B).

The uncontested evidence established that over an eight month period in 1969, petitioner supplied sports betting information by telephone from Las Vegas, Nevada, to a large-scale illegal bookmaking operation in Ohio and that the information was an integral part of the bookmaking operation.

1. Petitioner contends that he is entitled to a new trial on two substantive counts because he was acquitted on the charge of conspiracy to commit those offenses. This contention is without merit.

The jury found petitioner guilty on an indictment charging (1) that from March 1969 to November 1969 petitioner, named accomplices, and others unknown, used the telephone for the transmission between Nevada and Ohio of information assisting in the placing of bets on sporting events, and (2) that during this same period, petitioner, named accomplices, and others unknown, used the telephone between Nevada and Ohio to promote an illegal gambling business (Appendix in the court of appeals, pp. 97-98). Count Three of the Indictment (*id.* at 98-100) charged that these offenses were committed pursuant to a conspiracy, and the jury acquitted petitioner of that charge.

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[1]Petitioner was acquitted on the charge that these offenses were committed pursuant to a conspiracy.

Petitioner bases his argument that he is entitled to a reversal on the claim that the convictions on the "substantive offense[s were] obtained through the use of massive hearsay testimony admitted only under an unproved conspiracy charge" (Pet. 9). The argument fails because the premise is erroneous: The hearsay was not admitted under a "conspiracy charge," proved or unproved. When a joint venture is shown, declarations of the co-venturers are admissible against other co-venturers whether or not a federal criminal conspiracy is charged or proved by the evidence.

> The notion that the competency of the declaration of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admission does not depend upon the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against his principal. [*United States* v. *Olweiss*, 138 F. 2d 798, 800 (C.A. 2).]

See also *United States* v. *Annunziato*, 293 F. 2d 373, 380 n. 4 (C.A. 2).

Moreover, even assuming that a conspiracy must be shown as a predicate for the admission of co-conspirators' declarations, the conspiracy need not be proved beyond a reasonable doubt before hearsay statements of alleged co-conspirators are admissible; the prosecution need only establish by non-hearsay evidence a defendant's participation in the conspiracy to the extent of making "a prima facie case," *United States* v. *Oliva*, C.A. 5, No. 73-3109, decided July 17, 1974, or "by a fair preponderance" of the evidence, *United States* v. *D'Amato*, 493 F. 2d 359, 363 (C.A. 2).

In this case, Nello Ronci, one of petitioner's accomplices, testified that he was engaged in the gambling business in Ohio with co-accomplice Raymond Vara, that he and Vara got betting information from a man named John in Las Vegas, and that John was John Martinez (Tr. 643-645, 673, 718, 723-724). Petitioner's identity as the same John Martinez was established by comparison of his voice with that of the John Martinez referred to above on tape recorded coversations, by gambling paraphernalia found in his residence (Tr. 60-92), by a receipt, also found in his residence, for a money order sent from petitioner to Vara (Tr. 92), and by telephone records (Tr. 218, 223-224, 261). This evidence is sufficient to meet either of these tests and the jury's acquittal on the conspiracy count is not a finding to the contrary.

2. Petitioner's contention that the evidence derived from wire interceptions should have been suppressed because he was not identified in the application and order for the interception was properly rejected in the opinion of the court of appeals, on which we rely. The court stated (Pet. App. B-8 to B-9):

> The record indicates that appellant's identity was known to the FBI prior to the time that the authorization was sought and that something was known of his contacts with the only person named in the application. The application sought authorization "to intercept wire communications of Raymond Paul Vara and others as yet unknown * * *" The government maintains that although it knew of appellant's existence at the time the application was made, he was included in the phrase "others as yet unknown" because at that time it was not known that he was using a telephone for an illegal purpose. Appellant

lived in Las Vegas and the telephones which were tapped were in Ohio.

> In *United States* v. *Kahn*, [415 U.S. 143, 155] the Supreme Court held that the government is not required to conduct a thorough investigation to learn the identity of every person who is likely to use a telephone for illegal activities before applying for an order authorizing interception of communications over the particular instrument. The term "as yet unknown" may properly be applied to persons whose identity is known, but who the government has no probable cause to believe are involved in illegal use of communication facilities. Although Martinez was known as an acquaintance of Vara, his role in the interstate transmission of forbidden gambling information was first discovered by the interception of calls over the Vara telephone. Under these circumstances, he was not entitled to have the evidence suppressed for failure to name him in the application and order.

3. Petitioner's contention that he is entitled to an evidentiary hearing to determine whether the application for the wire interception order was authorized by the Attorney General is without merit. As the court of appeals held (Pet. App. B-6), the personally initialed memorandum of the Attorney General and the affidavit of Sol Lindenbaum, the Attorney General's executive assistant, established that the Attorney General personally authorized the application, thus bringing this case within the scope of *United States* v. *Chavez*, 416 U.S. 562, upholding such authorizations. See *United States* v. *Fiorella*, 468 F. 2d 688, 690-691 (C.A. 2), certiorari denied, May 28, 1974, No. 72-863, and *United States* v. *Cox*, 462 F. 2d 1293, 1297-1299 (C.A. 8), certiorari denied, May 28, 1974, No. 72-5278, which involved similar affidavits.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.